However, just prior to Kainecki's testimony, witness Jack Murphy testified. (A. 45, 46) His testimony, although brief, described discovery that a tractor was missing from the yard of Red-Ball Express and the fact of his conversation concerning it, and report of the missing tractor to the police. (A. 45)

At this point it became apparent that the prosecutor was seeking to prove the offense of stealing a tractor. His method of proof was identical with his claimed proof of theft of the trailer, *i.e.*, by proof that it was missing.

Objection and motion for mistrial was made and denied. (A. 46.) All defendants joined in the motion.

Two of the three witnesses against Cozzo observed him from 150 to 180 feet away. One said he saw him for an instant but so far away he could not overtake him. Certainly, the prejudicial, intentional and false indication that Cozzo was a known cartage thief, the inadmissible evidence of the stealing of a tractor by some unknown, the incompetent charge to the jury and the arbitrary limitation to twenty minutes of argument on behalf of the defendants demonstrates that these convictions cannot be said with certainty to have been obtained by a fair trial.

II.

The Government Brief ignores and avoids answer to our arguments as to failure to charge the jury as to "value" (See Petition p. 19-20), an essential element of the offense and the basis for fixing punishment.

No answer is made as to the Court's failure to either read or explain the statute involved to the jury. Nor is answer made to our argument as to the equivocal and conflicting instructions given as to "knowledge" and the requirement that the theft be from a place enumerated in the statute (Petition pp. 20-21).

III.

The government in its brief (Br. 12) misapprehends the point urged in the Petition at pp. 28-29. We do not challenge the specificity of the indictment nor the meaning of "depot". Nor do we question storage in a yard other than a building. The indictment description of the place of the theft was adequate. But, the proof did not comport with the allegation that the theft was "from a depot of the New York Central System". The proof did show the theft from the yard of the New York Central Transport Co., which rented the space where the vans were unloaded (A. 18) and that the Transport Co. is a distinct entity from the New York Central Railroad (Petition p. 28).

Respectfully submitted,

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